United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

75-6111

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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P/S

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

UNIVERSAL MAJOR INDUSTRIES CORP., JAMES G. DUNCAN, TRANSAMERICAN PETROLEUM CORPORATION, ROY M. HORSEY, BANNER OIL AND GAS FUNDS, INC., IAN McCARTNEY, EDWARD G. GEDALECIA,

Defendants,

ARTHUR J. HOMANS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT

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POINT I

IN TAKING THE POSITION THAT THIS COURT SHOULD COMPLETELY DISREGARD HOCHFELDER IN DECIDING THIS APPEAL BECAUSE THE TEACHINGS OF THE SUPREME COURT IN THAT CASE ARE IRREVELANT TO THE PRESENT ISSUES, THE COMMISSION IS MISGUIDED AND UNFAIR TO BOTH THE SUPREME COURT AND THIS COURT.

In its brief, the Commission asks this Court to ignore completely the Supreme Court's landmark decision in Ernst & Ernst v. Hochfelder, __U.S.__, 96 S. Ct. 1375 (3-30-76), because there is absolutely nothing in the Supreme Court's opinion that sheds any light at all upon the issues presented on this appeal. In taking that position, the Commission is more than merely incorrect, it is misguided and unfair to both the Supreme Court and this Court, for it fails to credit the Supreme Court with any intelligent jurisprudential reason for raising and underscoring certain issues which the Court chose not to answer in that opinion, and it also deprives this Court of thoughtful guidance from the Commission as to how those issues pertinent to the present appeal might be resolved consistent with the reasoning of the Supreme Court in Hochfelder and with the SEC's enforcement obligations under the securities laws, as its General Counsel perceives them.

In denying the existence of an issue clearly raised in Hochfelder as to whether or not civil aiding and abetting liability under the securities laws is consistent with a strict construction of the pertinent statutory language and

a careful reading of the legislative history, the Commission simply begs that question and refuses to join issue with the appellant on the primary issue raised on this appeal.*

The Commission's position in this connection would have this Court believe that in writing Footnote 7 the Supreme Court did not mean anything and, in effect, was being frivolous in simply pointing out, in passing, an issue that had already been resolved to its satisfaction in existing lower court opinions. The S.E.C. argues, in effect, that the Supreme Court

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*To further confuse matters and to distract attention from appellant's main argument (clearly designated Point I), the Commission's brief (p. 20) inaccurately describes appellant's Point IV as his "primary contention" and then completely misses the point of the argument to which it refers. Appellant's "no proof of an offering" argument is not an argument for the application of a §4(2) exemption, but involves instead the raising of a completely novel and preliminary issue not raised, decided or discussed in Ralston Purina, i.e., whether an "offering" was made within the meaning of the securities laws. That issue was not raised in Ralston Purina because the defendant company admitted in that case that a uniform offering had been made to hundreds of its employees. Thus the issue in Ralston Purina was whether or not a concededly integrated "offering" was made to the "public", not whether an integrated offering was made at all. If no "offering" was proved at trial, then the question whether it was made to the "public" is not reached in the present case. If no "integrated offering" was proved, then the applicability of §(4)(2) and the burden of proof on it was not presented. See Point V, infra.

did not intend in Footnote 7 to ask the other federal courts to reconsider and rethink that issue as one that could reasonably be raised and argued by a defendant accused of civil aiding and abetting. The implication is that the Supreme Court had no significant jurisprudential purpose in writing Footnote 7 and did not intend that it be taken seriously; it was just being playful and making unproductive work for the lower courts and various attorneys by suggesting the presentation of an argument considered to be without merit.

In short, the Commission asks this Court to ignore Hochfelder completely and to regard Footnote 7 as an utterly meaningless and frivolous gesture by the Supreme Court that casts no shadow of doubt whatever upon the viability of those lower court opinions which have sustained civil aiding and abetting liability under the securities laws.

The plain fact is that the Supreme Court is not in the habit of writing meaningless things in its opinions. It simply does not write something as provocative as Footnote 7 without intending to convey a significant message. The message clearly is that this is an important issue on which the circuit courts should seriously reconsider the reasoning of their prior decisions and certain assumptions involved in those decisions.

In substance, the Commission attempts in its brief to minimize Hochfelder and to sweep it under the rug. It asks this Court to ignore Hochfelder and to accept, in place of the strict constructionist reasoning of that decision, the broad

remedial construction upon which a number of circuit courts, including the Second Circuit, have based decisions upholding civil aiding and abetting liability under the securities laws. The Supreme Court was obviously aware, when Hochfelder was decided, of the lower federal court decisions cited in the Commission's brief. It cited Brennan v. Midwestern United Life Ins. Co., 417 F.2d 147 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970), as illustrative of those decisions. All of those decisions came down on the Commission's side of the issue raised in Footnote 7.

It would seem self-evident that there would have been no point in writing Footnote 7 if the Supreme Court had reviewed the pertinent lower court decisions and found the conclusions set forth there to be correct beyond question. It is obvious that the Supreme Court reviewed those decisions and found them to be something less than overwhelmingly persuasive. In effect, the Commission's brief on this issue has been written before, in four opinions by this Court,* eight opinions in other circuits,* and at least four additional district court opinions.* And still the Supreme Court is not convinced of the persuasiveness of the conclusion on civil aiding and abetting liability repeatedly

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* Cited in SEC's Brief, notes 31, 32 and 33.

reached in those opinions. The unanswered question is why it is not.

The main reason is, we submit, that the lower court holdings cited by the Commission are not consistent with the strict construction reading of specific statutory language employed in Hochfelder and presented in appellant's main brief. In Hochfelder the Supreme Court found "the language and history of §10(b) dispositive" and expressly rejected the broad remedial interpretation of the statute argued by the SEC. However, that argument was only adopted by the S.E.C. and successfully urged upon a number of lower federal courts, including the Second Circuit, a few years earlier. As Judge Ward points out in a recent decision,* the Supreme Court's rejection of a negligence standard under §10(b) in Hochfelder is fundamentally inconsistent with the position successfully urged in the past by the Commission upon this Court ** that proof of negligence is sufficient to justify a conclusion of liability in an injunction action brought by the Commission. In Hochfelder, Footnote 12, the Supreme Court expressly raised but left undecided the question "whether scienter is a necessary element in

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* S.E.C. v. Bausch & Lomb, Inc., ___F. Supp.___(S.D.N.Y., 73 Civ. 2458, 9-16-76), p. 28.

** In S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 854-55 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); S.E.C. v. Management Dynamics, Inc., 515 F.2d 881 (2d Cir. 1975); S.E.C. v. Spectrum, 489 F. 2d 535, 541 (2d. Cir. 1973).

an action for injunctive relief under § 10(b) and Rule 10b-5." In Bausch & Lomb, Judge Ward decided that issue against the Commission, on the ground that the conclusion reached was required by the reasoning of Hochfelder. A similar result is required in the present case, and for the same reason.

In Hochfelder, the Supreme Court rejected an interpretation of the securities laws first urged successfully by the Commission on a circuit court a few years earlier. In so doing, it expressly concluded that "the Commission's original [i.e., pre-negligence] interpretation of Rule 10(b)-5 was compelled by the language and history of § 10(b) and related sections of the Acts." In the present case, this Court is required by the reasoning of Hochfelder to reject two recent SEC additions to federal securities law: (1) liability for "negligence" rather than scienter (i.e., intent to defraud or knowledge of illegal conduct) and (2) liability for civil "aiding and abetting."

A further reason why the Supreme Court has failed to find the lower court "civil aiding and abetting" cases persuasive is keyed to the operative statutes. There is a specific statute creating criminal liability for aiding and abetting the commission of a federal crime. 18 U.S.C. § 2 (1970). There is no such statutory authority for the imposition of civil aiding and abetting liability.* The significance of that distinction was not perceived by the district court in S.E.C. v. Timetrust, 28 F. Supp. 34, 43 (N.D. Calif. 1939),

*In its brief (p. 32, n. 36) the S.E.C. admits that it has been lobbying unsuccessfuly for at least 20 years for the (con't)

reversed in relevant part, 142 F. 2d 744 (9th Cir. 1944), nor was the district court's reasoning on civil aiding and abetting accepted by the circuit court in that early case. In fact, the Commission's citation of the appellate decision in Timetrust is incorrect and seriously misleading. The district court decision is incorrectly cited as having been "reversed in part on other grounds", i.e., on grounds other than the district court's quoted conclusions of law on "aiding and abetting". In truth, that district court holding was squarely reversed by the Ninth Circuit. In reversing the injunctive judgment entered below against the secondary defendant "aiders and abetters" and thus requiring that the action against them be dismissed, the circuit court clearly, but in part implicity, did two things: (1) rejected the secondary "aiding and abetting" theory completely as a viable theory of recovery and (2) limited primary liability to persons who actively participated in "selling" the securities involved. The appellate court thus limited its interpretation of the law to the precise language of Section 5(a), just as appellant is urging this Court to do on this appeal. The absence of specific, direct statutory authority for aiding and abetting liability is a fatal flaw under the strict construction reasoning of Hochfelder, as it was in Time Trust.

Footnote continued

passage of a civil aiding and abetting statute.

POINT II

IF AIDING AND ABETTING LIABILITY IS UPHELD, HOCHFELDER REQUIRES SCIENTER AS AN ELEMENT OF SUCH LIABILITY UNDER SECTION 5 EVEN THOUGH IT IS A STRICT LIABILITY STATUTE.

The S.E.C. contends that, despite the decision in Hochfelder, liability for negligence can be imposed in this case because Section 5 is a "strict liability" statute, whereas Section 10(b) (involved in Hochfelder) is a so called "fraud" statute. That argument ignores the basic thrust of the Hochfelder opinion. It also ignores the fact that if "aiding and abetting" is a proper basis for civil liability under the securities laws, it is unquestionably an intentional violation requiring scienter, since one simply cannot aid and abet a violation of law inadvertently and without guilty knowledge of some kind.

Liability may be imposed strictly and without scienter upon primary violators* of a strict liability statute like Section 5, but not upon one who is charged with secondary liability for "aiding and abetting". It was an analgous difficulty under the federal criminal law that made necessary the passage of a specific criminal aiding and abetting statute.

*No proof was offered of any primary violation by Mr. Homans nor did the district court reach any conclusion to that effect. S.E.C. brief, pp. 3-4, 14-15.

It requires only a moment's thought to perceive that one cannot possibly aid and abet a violation of law unless he knows that the law is being violated and intends to participate in the violation. Negligent "aiding and abetting" is simply a contradiction in terms, this Court's decisions to the contrary in Spectrum and Management Dynamics notwithstanding.

Moreover, if there were such a thing as negligent aiding and abetting, it would be pointless to issue an injunction to prevent recurrence of the offending behavior, because negligence is by definition inadvertent and unintended. If negligent behavior could be prevented by court order, then automobile accidents could be eliminated by the issuance of injunctions in sufficient numbers to the general populace.

There is absolutely no indication in the language or legislative history of Section 5 or any other part of the securities laws that Congress intended the imposition of liability under those laws for negligent behavior without proof of scienter.

POINT III

THE COMMISSION's ARGUMENT THAT LIABILITY MAY BE IMPOSED FOR NEGLIGENCE IN ACTIONS BY THE COMMISSION BUT NOT IN ACTIONS BY PRIVATE PLAINTIFFS IS CONTRARY TO THE REASONING OF HOCHFELDER AND UNSOUND IN PRINCIPLE, DESPITE ITS ACCEPTANCE IN PREVIOUS DECISIONS BY THE SECOND CIRCUIT.

In its brief (p. 34, n. 37) the Commission attempts to support the viability of recovery on a theory of civil aiding and abetting by pointing out that in a number of earlier cases the Second Circuit has adopted an interpretation of the securities laws which none of the other ten circuits has been willing to accept, i.e., that where the suit is an injunction action by the Commission the applicable substantive law principles are different and less stringent than the standards applicable to actions prosecuted by private plaintiffs (whether the private remedy sought is injunctive or monetary). Five Second Circuit decisions are cited for that proposition: Spectrum, supra, 489 F. 2d at 541; Management Dynamics, supra, 515 F. 2d at 801; Lanza v. Drexel & Co. 479 F. 2d 1277, 1304 (2d Cir. 1973); S.E.C. v. Manor Nursing Centers, Inc., 458 2d 1096, n. 15 (2d Cir. 1972); S.E.C. v. Texas Gulf Sulphur Co., 401 F. 2d 833, 868, (2d Cir. 1968) (Friendly, J., concurring), cert. denied, 394 U.S. 976 (1969). Cf., S.E.C. v. Frank, 388 F.2d 486, 491 (2d Cir. 1968)(There is "no sufficient basis for concluding that Congress meant special weight to be given to the Commission's decision to allow its staff to institute suit.")

That argument is questioned in Hochfelder, supra, Footnote 12, and was rejected by Judge Ward of the Southern District on the basis of Hochfelder in Bausch & Lomb, supra. Since the Commission was the plaintiff in Bausch & Lomb, the Second Circuit cases cited above were undoubtedly cited to him as well and found by him to have been overruled by implication in Hochfelder. We submit that the position taken by Judge Ward and indicated by the footnote in Hochfelder is correct and that the position argued by the S.E.C. is insupportable on principle and no longer sustainable in the wake of Hochfelder.

As a matter of sound constitutional law there cannot be one set of substantive law principles applicable under the securities statutes to one class of plaintiffs (i.e., a government administrative agency) and a completely different set of principles applicable to federal court claims by ordinary private citizens. Such a distinction would be arbitrary and thus contravene fundamental principles of due process of law, since it would enable the result of two separate actions to be different given the same operative facts, depending upon the status or "class" of the plaintiff and not upon neutral principles of federal statutory jurisprudence. If there is one law as to liability where a government agency is a party and a different law applicable where a private party is the

plaintiff, then why not one law for landowners and another for persons who own no land, or one law for corporations and another for private citizens, or one law for employers and another for unions, or one law for presidents who commit federal crimes and another for lesser federal officials who violate federal criminal law.

This one set of decisions successfully urged upon the Second Circuit by the S.E.C. is the only instance we know of in federal jurisprudence where substantive rules of law are said to vary depending not upon the behavior of the defendant but upon the status or identity of the plaintiff and the degree of deference the courts are inclined to pay to plaintiffs of that class. In this instance the class would appear to be administrative agencies of the federal government.

If the day ever comes when government law enforcement agencies are afforded the protection and benefits of special rules of law not applicable on behalf of ordinary citizens, then the United States will be part way down the path toward statism, totalitarianism, and eventual dictatorship by the federal government. It was perhaps a belief in the existence of such a privileged status under the law that caused numerous F.B.I. officials to believe for years that they could conduct burglaries for which citizens not employed by that federal agency would have been tried in state court and imprisoned

for long terms in extremely unpleasant institutions.

Consider a single hypothetical securities action by the Commission in which private plaintiffs were permitted to intervene by permission of the court. If the Commission's position is correct, then it would be possible for the S.E.C. to win on liability in such a case based upon the lenient legal standard applicable in its favor and for the private plaintiffs to lose on the same findings of fact because a more stringent test of liability was required to be applied against them. The absurdity of such a result is self-evident, yet that is the kind of interpretation the Commission would ask this Court to place upon the securities statutes. Unfortunately, it appears to have succeeded in gaining some acceptance of this novel and dangerous doctrine from various panels of this Court in the past. The Commission's position should be rejected firmly and clearly by this Court for the reasons indicated above and recognized by Judge Ward in Bausch & Lomb, supra.

POINT IV

THE DISTRICT COURT APPLIED ERRONEOUS PRINCIPLES OF LAW TO THE ISSUANCE OF INJUNCTIVE RELIEF BELOW. REVERSAL OF SUCH ERROR IS NOT GOVERNED BY EITHER THE "CLEARLY ERRONEOUS" STANDARD OF RULE 52 OR THE PRINCIPLES APPLICABLE TO ABUSE OF DISCRETION.

Where the district court has applied incorrect principles of law to essentially undisputed facts, the error does not involve a finding of fact but rather a conclusion of law or the application of law to the facts. In such a situation the error involved is a matter of law and thus not governed by either the "clearly erroneous" standard applicable to findings of fact under Rule 52, F.R. Civ. P., or principles of abuse of discretion. In re Joseph Kanner Hat Co., Inc., 482 F. 2d 937 (2d Cir. 1973). In such cases, it is enough for reversal that the appellate court be convinced that the result reached below does not jibe with the applicable principles of law.

The district court below held, in substance, that the existence of past securities law violations alone, coupled with the mere possibility of future violations (by virtue of Mr. Homans continuing to represent two or three small but nominally "public" corporations with insignificant trading in or public markets for their stock), constitutes a sufficient basis for the issuance of an injunction upon application by the Commission.

That holding was based upon a defective reading of controlling principles of law and is related to the doctrine discussed in Point III, supra, that special and lenient principles of law are applicable to actions prosecuted by the S.E.C.

The district court's error was in its focus upon the past violations of law concededly committed by UMI and the other defendants, including attorney Gedalecia (which Mr. Homans was founded to have "abetted" as a secondary defendant) and in its failure to focus upon the plain and inescapable fact nowhere effectively rebutted by the Commission that there is absolutely no significant likelihood that Arthur Homans will violate the securities laws at any time in the future.

The reality of this action is that the Commission did not prosecute the suit against Arthur Homans for the only legally acceptable and justifiable purpose, i.e., to prevent likely future violations of law through the issuance of an injunction. Its actual purpose is something else entirely, a complex of purposes related to public policy concerning enforcement of the securities laws but unrelated to the need for an injunction. Arthur Homans was only peripherally or secondarily involved in the securities law violations committed and admitted by the other defendants. He was not

accused of, did not participate in, and was not found to have participated in any way in any act, securities transaction or violation involving scienter in the Hochfelder sense, i.e., fraud or intent to deceive.

Because of the overall facts in this case (which Mr. Homans does not deny, condone or maintain to have involved no violations of law), the Commission feels compelled to prosecute this action against Mr. Homans purely to punish him and thereby to make of him an intimidating example for other members of the bar who represent publicly held corporations. Consistent with such perhaps desirable but impermissible purposes, the Commission wishes to purge Mr. Homans from the practice of securities law before it under Rule 2(e) of its Rules of Practice* --- something it cannot do unless Mr. Homans is found guilty of fraud (which he has not been) or permanently enjoined.

Since the S.E.C. is not authorized to bring actions for purely declaratory relief and must either bring an injunction suit or none under the law, its legal staff feels compelled from time to time, to bring an action where the facts involved violations of law even though no likelihood or possibility of future violations remains alive in the circumstances.

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*17 C.F.R. 201.2(e)

This is one such case. If this action were brought by a private plaintiff, perhaps a stockholder of UMI, to enjoin Arthur Homans from continuing to violate the securities laws by selling or assisting the sale of unregistered UMI stock, the action would be dismissed in a thrice for lack of the slightest proof that Mr. Homans could, would, or is likely to do in the future acts similar to those set forth in the complaint. The same result should follow in an action by the S.E.C.

The time has come when the S.E.C. must cease to receive virtually anything it asks for from the federal courts in the way of injunctive relief. It must be brought back to the reality set forth in the specific statutes it exists to enforce. Those statutes do not permit either the prosecution of an action or the issuance of an injunction unless there is a clearly proven need to prevent <u>future</u> conduct in violation of law. Those principles have been lost sight of in this case.

Arthur Homans does not, as the S.E.C.'s brief maintains (p.38), argue before this Court that his past behavior was above criticism, free from fault, "legitimate" or "proper". Indeed, after the district court rendered its decision on the merits below, Mr. Homans asked that the trial record be reopened (which was done) and he admitted to the Court that the practices he used in the past in rendering securities law opinions under

Section 5 (and considered proper and acceptable at the time) were not acceptable under the law as he had since come to understand it based upon new cases and regulations. He stated he no longer used those practices and went so far as to offer to have the practices he presently employs and considers "proper" specifically incorporated in the final judgment of the district court. That was clearly not the behavior of an unrepentant sinner defiant and intent upon defending and repeating his past behavior if given a chance to do so. In attempting to depict Mr. Homans as such a person, the Commission's staff has done Mr. Homans a grave injustice. Its argument in this connection is arrogant and plays fast and loose with the true facts of this case.

There is absolutely no question on the present record that Mr. Homans now "appreciate[s] the scope of the registration requirements" set forth in the securities laws. (S.E.C. brief, p. 39). The record was expressly reopened to allow him to demonstrate that fact by his own testimony. Judge Tenney clearly accepted that testimony as truthful. He made no findings to the contrary after it was introduced, and the Commission offered absolutely no proof to the contrary.

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*Appendix, A 184-215.

The reasoning of Judge (now Chief Judge) Kaufman quoted from S.E.C. v. Graye, 156 F. Supp. 544, 547 (S.D.N.Y. 1957) (SEC brief, p. 40) is not applicable to the present facts for the obvious reason that, unlike the circumstances in Graye, the issuance of an injunction in the present case does, in fact, "seek to put defendant out of business" and will have precisely that effect, for disbarment from practice before the Commission under Rule 2(e)* will follow almost automatically and such disbarment will unquestionably destroy Mr. Homans' law practice and drive him from active engagement in the practice of a profession he has served well for forty-eight years, with the possible exception of the facts involved in the present case.

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*17 C.F.R. 201.2(e)

POINT V

THE COMMISSION's BRIEF MISINTERPRETS APPELLANT's ARGUMENT THAT THERE WAS NO PROOF OR FINDING BELOW OF AN INTEGRATED "OFFERING" WITHIN THE MEANING OF THE SECURITIES LAWS. IF THERE WAS NO PROOF OF AN "OFFERING" COVERED BY THE SECURITIES LAWS, THEN THE QUESTION WHETHER SUCH AN OFFERING WAS MADE TO THE "PUBLIC" OR NOT IS NOT PRESENTED*.

In S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953), the defendant corporation admitted and the parties stipulated to the facts concerning a stock offering of thousands of shares of the same security by one party (the issuer) on identical terms to hundreds of employees. All of the offers were made for the same corporate purpose. Thus the existence of an extensive and "integrated" interstate securities offering was admitted in that case. There was no question about the fact that an "offering"had been made. The only question presented was whether or not that offering was made to the "public" or was "not a public offering" within the meaning of Section 4(2). Thus the Supreme Court focused the discussion in its opinion quite correctly upon the "class of persons" to whom the integrated offering had been made and found that class to have been "public" for policy reasons grounded in the statute.

*See footnote, p.2, supra.

In this case, appellant is raising the preliminary issue not presented in Ralston Purina, i.e., whether or not an integrated "offering" was proved at trial. If no such offering was proved, the question of its character as "public" or "not public" under §4(2) simply is not reached and the burden of proof on the application of the §4(2) exemption is irrelevant. In its opinion below, the district court indicated that it had either failed to grasp the thrust of this argument or simply chosen to avoid it on the insubstantial ground, stated in a footnote, that the concept of an "integrated offering" applies only to the so-called "intrastate offering" exemption.

The issue raised here is novel. Appellant maintains that the burden of proof as to an integrated "offering" is upon the Commission because the existence of an "offering" of securities is a necessary element of the civil violation of making securities sales pursuant to an "offering" that was neither registered nor covered by an exemption. As to the applicability of an exemption in a pure aiding and abetting case like this one, appellant maintains that the burden of proof is on the Commission, although the rule would be different in the case of a primary violation. But even if he is incorrect in that argument, the preliminary argument remains: at the trial of this action, the Commission failed to prove the first and most basic element of its theory

of civil liability, that the unregistered stock sold by UMI and certain of the other defendants was part of at least one, integrated "offering" within the contemplation of Section 5. Ralston Purina provides no guidance on that question, and its holding is not dispositive because the question of what constitutes proof of an integrated "offering" was not presented or decided there.

POINT VI

THE COMMISSION's BRIEF CONTAINS MANY FALSE AND POTENTIALLY DECEPTIVE STATEMENTS OF FACT

The Commission's brief contains, among many others, the following false and potentially deceptive statements:

(1) On page 6, the brief states that shortly after the March 1967 private offering of 6 percent debentures Mr. Homans learned "that the number of individuals who had purchased these *** debentures was far in excess of what he had been led to believe". Exhibit H, Mr. Homans' opinion letter dated May 26, 1967, clearly states that at that time there were not more than 21 recipients, of whom seven were officers and directors. That was not a number "far in excess" of what Homans had been led to believe, nor was it vastly beyond permissible legal limits. Mr. Homans advised UMI at that time to sell no more debentures until the offering was registered. The district court's finding that appellant knew at this time that UMI was violating the law and not to be trusted is not supported by the facts in the record.

(2) The facts stated in Note 7 (p. 7) have nothing whatever to do with Arthur Homans or with the Commission's case against him. The shares there described were issued pursuant to direct opinions by defendant Gedalecia at a time when Homans

had withdrawn completely as corporate counsel for UMI and Gedalecia was its only attorney. No letters of any kind by Mr. Homans were involved in any of those transactions. Schedules presented by the Commission at trial made the facts in this connection quite clear. It is a mystery why the Commission resurrects these facts on appeal, when they were dropped from the case at trial as not relevant to Mr. Homans.

(3) The statement in Note 14 (p. 16) is false. Neither in the Type I nor in the Type II letters did Mr. Homans cite §3(a)(9) as the basis for an opinion. The same criticism applies to Note 19 (p.21).

(4) Note 24 describes the record incorrectly. In fact the record does indicate clearly which of the stock recipients were members of the "Horsey Group", because Mr. Homans' testimony described every recipient in chronological order and, in the process, identified every member of the Horsey Group. Such persons included, but were not limited to, the following: Horsey, P. Clarkson, C. Clarkson, Woltz, Theiss, Sundling, Moore, Van Kampen, Brooks, Linn, Breen and G. Clarkson.

(5) Note 27 (p. 23) does not establish the existence of <u>any</u> integrated offering on the basis of the trial proof reflected in the record. The considerations paid varied, the sellers varied, the purposes for the transactions varied. No

attempt was made at trial to comply with the Commission's own criteria.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE AND IN APPELLANT's MAIN BRIEF, THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

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Bradley R. Brewer
Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd. MASPETH, N.Y.C.

That on the 15th day of OCTOBER, 1976, deponent personally served the within REPLY BRIEF OF DEFENDANT-APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

SECURITIES & EXCHANGE COMMISSION
Washington, D. C. 20549
Attn: Howard B. Scherer, Esq.
For Plaintiff-Appellee.

Robert La Grassa

Sworn to before me this
15th day of October, 19 76.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978